STATEMENT SUBMITTED

BY

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TO

SUBCOMMITTEE ON SUPERFUND AND WASTE MANAGEMENT
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ON

PROPOSALS TO CLARIFY GOVERNMENT CONTRACTORS' RISK OF LIABILITY

FOR

RESPONDING TO NATURAL AND OTHER DISASTERS

November 8, 2005

Willis

Good afternoon. My name is Paul Becker; I work at Willis, a global insurance broker, as the North American Construction Practice Group Leader. I am proud to lead this practice, as my colleagues and I represent more than 3,500 construction related clients in North America. We work to structure and secure effective risk management programs that can address safety issues, contractual liabilities, surety bonds and more. I have been in the insurance business for 27 years – the vast majority of which has been in the construction sector – and it is my pleasure and honor to appear before you today testifying as to the importance of insurance in the clean up of New Orleans in the wake of Hurricane Katrina – specifically the need to limit the liability of contractors engaged in this important work.

As insurance brokers, we work with our clients around the world and across all industries helping them assess, quantify, mitigate and transfer their risks thereby allowing them to focus on achieving their business goals. Doing so affords them the comfort and confidence that their assets – property, people, intellectual capital, equipment – are more than adequately and properly protected against a broad range of risks. We are not an insurance company – that is, we do not underwrite the risks. We are an intermediary bringing the two parties together working to fashion the very best, customized coverage we can secure for our clients. As part of this client advocacy, we work with and have developed strong relationships with insurance carriers around the world such that we know their risk appetite, how they consider certain risks and the various factors they weigh in their underwriting decisions. Given our experiences, we have a working knowledge as to how they think and how they approach various risks – essentially whether or not to underwrite a risk, how to price a policy and how to set the terms and conditions of a policy – which amounts to a contract.

Experience with Extraordinary "Job Sites"

In the aftermath of the events of September 11, 2001, Willis secured the insurance coverages for the contractors who cleaned up the World Trade Center site. Quite thankfully – for obvious reasons – the characteristics of this site were unlike any we or anyone else in either construction or insurance had previously seen. Normally, before the clean-up of a disaster site starts, environmental and engineering firms conduct studies, run assessments and issue reports as to the nature of the site and the specifics involved. Due to the outstanding circumstances of the events of 9/11, there was not time for such exercises and contractors got to work without a full understanding of what was ahead. How stable was the ground? What were the asbestos levels? What other hazardous materials could have a long-term impact on health of the workers and general public? Today, over four years since 9/11, the number of law suits being filed continues to grow. Only in time will we determine the balance between the insurance purchased vs. claims now being filed in New York. But one thing is certain, litigation, upon litigation, upon litigation has created a great deal of uncertainty and serious concern among the contractors involved.

While the scope of the New Orleans effort is multiples larger than the World Trade Center site, these same concerns are at hand today as they were in September 2001. The fundamental problem in securing the necessary coverage is a reflection of the four component actions I mentioned a few moments ago – insurance is about assessing, quantifying, mitigating and transferring risk. Models predict likely scenarios, calculate possible losses and then intelligent plans determine how to avoid such problems and spread the risk among various parties at an appropriate price. In these unique situations, there may be a tendency to focus on the financing of the risk so the work can get underway. But without the assessment, how does a carrier know what the possible losses are? And if the risks are unknown such that there could be significant

unforeseen liabilities, 1) how can contracting firms adopt preventative measures to avoid problems which will give rise to future claims? and 2) how can carriers determine the right price for the coverage?

Over the last several weeks, we have been engaged in conversations with carriers around the world on this matter and they are expressing to us the very concerns that I am sharing with you today:

- Uncertain site conditions;
- Unusual and unknown health hazards;
- What chemicals are being released into the air during the clean-up?;
- The limited nature of the tools available to assess the number and types of environmental factors in play;
- Varying standards between local, state and federal authorities;
- The fast track nature of the work to be done; and,
- The lack of certainty on contracting provisions and legal environments.

All these factors substantiate that the traditional methods of risk identification, control and underwriting have been significantly altered and make it difficult to estimate – or even guess – what the full extent of the long-term liabilities arising from the clean-up will be. It leads us to question whether the insurance industry has the ability to fully underwrite the risks inherent in this work. If this bears out, contractors will be left fending for themselves without adequate insurance protection. That is not to say that contractors will not be able to purchase insurance in some form for their activities in the Gulf; rather, without addressing the unique factors in this situation, the coverage they will be able to obtain will in most cases not adequately protect them

over time from the exposures they will be facing. And this is not a question of if but when and based on our experience, these matters will manifest themselves over a 5 to 10 year timeframe – though there is already talk of the "Katrina Cough."

I might add that without adequate protection, contractors cannot properly account for their risks and endanger the long-term viability of their companies. Accordingly these issues could prevent quality contractors from participating in the clean up and recovery efforts.

This is important legislation. While many first-rate contractors are already on the ground participating in this important effort, many others are hesitant to get involved in projects of this magnitude unless they have insurance against what are normally quantifiable risks. And carriers as well tend not to write policies if they are not able to make the necessary judgments. In the case of New Orleans, as it was with the World Trade Center, it will be almost impossible to establish the proper control procedures to protect their interests. Limiting the liability of construction companies engaged in the clean-up of New Orleans such that they can gain the cover they need is critical and it has been my distinct honor to share my experiences with you this afternoon.

Mr. Chairman, I've concluded the section of my prepared remarks that I would like to share with you today and am happy to enter the remainder – which addresses some general issues of insurance you may wish to consider – into the record. And I would be happy to answer any questions you might have.

Some additional background on insurance

Insurance is meant to have the premiums of many similarly insured parties pay for the losses of the few which actually have claims. By financing risks in such a way, insurance serves as a vital tool supporting commercial activity. It brings the assurance of capital when the unforeseen and unfortunate event occurs. Insurance enables construction firms to undertake work knowing that they have a financial partner ready to provide capital that may be necessary to assure that the contractor remains viable and can complete the work as promised.

Both the insurance carriers and their insured construction contractors have a great interest in working together to identify risks and to develop effective protocols and procedures to avoid or control those risks. Clearly identifying and managing risks to avoid losses is the most cost-effective approach for both parties. This critical part of the insurance process, that of identifying and trying to measure risks, is often not understood by non-insurance professionals, but it is completely integrated into the process of agreeing to insure certain risks and how much such insurance costs. Simply put, if insurance companies do not or can not understand the risks they are being asked to insure, they have a very difficult time providing the risk financing which allows companies to operate.

Insurance policies by their nature are specific to different types of risks and exposures, and contractors often purchase a number of different types of coverage each year to address different operational risks. The most relevant to today's hearing are the coverages which come into play for liability protection when claims are brought by third parties. They include:

- **General Liability Insurance**, which addresses the liabilities contractors have to third parties for operations and for damages or injuries which occur once those operations are completed. This coverage applies to many obvious types of situations including injuries to third parties, and damage to property while performing operations and once the work is completed. These policies do not normally extend to environmental liabilities which arise out of the work. Those types of risks are usually insured by Pollution Liability policies.
- **Contractors Pollution Liability**, which addresses liabilities that arise out of hazardous materials which contractors encounter on job sites. In the case of the clean up and reconstruction activities it is expected that this will be a critical coverage. It is important to note that this policy differs from insurance company to insurance company and as a result has significant differences in scope of coverage and limits of liability which can be obtained.
- **Umbrella and Excess Liability**, which is used as a method to obtain higher limits of coverage excess of the General Liability insurance limits. It does not act to increase the pollution liability limits.

To understand the complex limitations of such insurance, it is important to note:

- Each insurance company offers different coverages for each policy depending on their underwriting philosophy and financial goals.
- Policies are underwritten based on the underwriters' understanding of the risks and typically narrowed to cover those risks which are known or can be anticipated.
- These policies all have a defined limit of insurance which once exhausted, cause the policies to no longer respond.
- The policies respond to the liability of the specific contractor so it is often the case that a claim will cause several insurance carriers to respond to several contractors. This can cause

significant delays in addressing claims as liability is sorted out by the legal process and each carrier defends each insured separately.

- Coverages vary as noted from carrier to carrier and from contractor to contractor based on the individual contractors' understanding of its risks, its expertise in obtaining coverage and the amount of premium involved.

Insurance is a risk financing business which uses historical data to predict future costs and establish premiums. The limitations noted above create a situation where, in the case of a broad based catastrophe such as Katrina, claims will be unknown at the outset, difficult to predict or measure, and subject to uncertainty of how insurance coverage will respond. This contrasts with normal construction activities where underwriters have significant experience and data which shows a path to pricing the risk and taking on the exposure in the form of insurance policies.